

**UNITED STATES COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

**DETERMINATION OF ROYALTY RATES AND  
TERMS FOR MAKING AND DISTRIBUTING  
PHONORECORDS (Phonorecords IV)**

**Docket No. 21-CRB-0001-PR  
(2023-2027)**

**ORDER GRANTING IN PART GOOGLE’S MOTION TO COMPEL  
DOCUMENTS AND INFORMATION FROM COPYRIGHT OWNERS**

THIS MATTER is before the Judges on the motion (Motion) of Google LLC (Google) seeking an order compelling Copyright Owners (Copyright Owners<sup>1</sup>), comprising National Music Publishers’ Association (NMPA) and Nashville Songwriters Association International (NSAI), to produce documents and information responsive to Google requests for production numbered 2 and 3 (RFP 2 and RFP 3, respectively). Copyright Owners filed a Memorandum in Opposition ... (Opposition). Google filed a Reply in Support of Motion ... (Reply).

**RFP 2**

Specifically, with respect to RFP 2, Google’s Motion seeks production of “[a]ll royalty statements from January 1, 2009 to the present for each of the top 10% of Songwriters receiving royalties from each Music Publisher in each calendar year, including 2021 year to date.” Google argues that these royalty statements are directly related to Copyright Owners’ written direct statement (WDS) because they would show whether the Copyright Owners’ contention that mechanical royalties have diminished over time, to the detriment of songwriters and the music publishing industry as a whole, are true. Motion at 2. Google asserts that it must have the specified information in order to “test” Copyright Owners’ assertions that songwriters’ income from mechanical royalties has declined to subsistence levels.<sup>2</sup> Google contends that Copyright Owners’ hand-picked witnesses whose testimony regarding mechanical royalty income would support Copyright Owners’ WDS. *Id.* at 6.<sup>3</sup> According to Google, “COs have proffered the testimonies of Songwriters who seem to fall on the lower end of the spectrum when it comes to mechanical royalties ..., Google’s RFP No. 2 seeks the royalty statements from the **top** 10% of Songwriters for each Music Publisher to round out the story.” *Id.*

<sup>1</sup> References to “CO” in quoted materials denote Copyright Owners.

<sup>2</sup> Google points to various sections of Copyright Owners’ WDS as support for its argument that RFP 2 is directly related to that WDS. *See* Motion at 2-6 and Google Reply at 2, citing Copyright Owners’ Introductory Memorandum, Beekman WDT, Bogard WDT, Brodsky WDT, Floyd WDT, Kelly WDT, Kokakis WDT, Yocum WDT, and COEX-1.3.

<sup>3</sup> In written testimony, some songwriters used the time period between 2009 and 2021 to illustrate comparative income levels. Google contends that COs put royalty statements dating back to 2009 at issue by arguing for the adoption of their rate proposal based on purportedly detrimental trends in the music publishing industry since at least 2009 and the claimed resulting decline in mechanical royalties received by songwriters. Motion at 7.

Google dismisses Copyright Owners' claims that the information Google seeks in RFP 2 is unduly burdensome, opining that "[i]t is not credible for the COs to say they cannot feasibly provide songwriter royalty information in discovery when they have developed sophisticated technological platforms to provide that information to songwriters." *Id.* at 8. Google also disputes the sufficiency of Copyright Owners' responses to Services' Interrogatory 11, arguing that the responses fail to identify a single royalty statement. *Id.* at 8-9.

Copyright Owners agree with the streaming services that the music industry has grown with the growth of music streaming. Copyright Owners do not dispute that streaming services' royalty payments to music publishers have increased with that growth. Copyright Owners argue, however, that notwithstanding that growth, mechanical royalties that songwriters receive from streaming services, including shares they receive from publishers, have declined. *See, e.g.*, Written Direct Testimony of Jimmy Yeary (Oct. 13, 2021) ¶ 36-37; Written Direct Testimony of Thomas Kelly (Oct. 13, 2021) ¶ 85; Written Direct Testimony of Annette Yocum (Oct. 13, 2021) ¶ 49 (growth of income from streaming comes at expense of [subpart B] income).

Copyright Owners argue, however, that the RFP 2 requests do not relate to their WDS. In addition, Copyright Owners assert that in RFP 2 Google seeks to "inflict substantial and undue burden" on Copyright Owners without any attempt to justify its request given the information produced in discovery to date. Opposition at 2. Copyright Owners contend that Google's request would require millions if not tens of millions of pages of royalty statements. *Id.* at 3. Copyright Owners also argue that they have no means, other than by human review of the royalty accounts, to identify whether a particular account is "a songwriter or an heir or a publisher or some other royaltor." *Id.* at 4.<sup>4</sup> Copyright Owners claim that Google's rationale for the requested discovery is "pretextual, illogical and unsupported." *Id.* at 5. Copyright Owners contend that their claims regarding the purported downward trend in mechanical royalties from at least 2009 to the present is already documented in the financial records submitted with Copyright Owners' WDS, already produced by the music publishers in discovery, and available in the data from *Phonorecords III*. *Id.*

Moreover, Copyright Owners contend that providing information specific to the top 10% of songwriters for the decade-plus timeframe would not answer the question Google poses or support Google's hypothesis, as the complement of top 10% of songwriters would change year to year as could the character of the account client. *Id.* at 5 n.4. Copyright Owners further contend that even if one could isolate the top 10% of songwriters in each period, that information would not tell one anything about the overall level of mechanical royalty income paid to songwriters generally. *Id.* at 6-7.

Copyright Owners allege that Google's true motivation behind RFP 2 is to support Google's own assertions for its rebuttal case regarding the relations between music publishers and songwriters. They contend it is Google's purpose to show that Copyright Owners'

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<sup>4</sup> In its Reply, Google states that it would be willing to modify RFP 2 to seek royalty statements for the top 10% of clients rather than the top 10% of songwriters. Reply at 5. Google contends that the alleged volume of pages that the requested royalty statements might reach is purely hypothetical and was raised for the first time in Copyright Owners' Opposition. Google accuses Copyright Owners of unreasonable "stonewalling." *Id.* at 5-6.

songwriter witnesses were cherry-picked by Copyright Owners, a justification that is not based on Copyright Owners' WDS. *Id.* at 7-8. Copyright Owners contend that in the meet and confer process, Copyright Owners agreed to produce client-related information for identified selections of publisher clients, a compromise from which Google stands to benefit. Copyright Owners contend, and Google disputes, that Google acted in bad faith because it waited a month after the meet and confer process to move for more and more burdensome information beyond that compromise. *Id.* at 8.<sup>5</sup>

### **RFP 3**

Google's RFP 3 seeks "[a]ll license agreements, and any amendments, extensions, or renewals of same, entered into by Music Publishers from January 1, 2009 to the present in which revenues of the licensee are allocated or subject to any form of reduction for purposes of calculating royalty payments." Google asserts these documents are "plainly directly related to" Copyright Owners' WDS. Motion at 10. Google highlights Copyright Owners' references to "benchmarks" and "free market deals" in support of some of their proposed terms.<sup>6</sup> According to Google, Copyright Owners propose numerous so-called "improved terms" and "changes to several key definitions" that they claim "capture important concepts" and "close loopholes" to remediate allegedly depressed mechanical royalty rates. *Id.*, quoting Copyright Owners' Introductory Memorandum at 2, 15, 20.

Google notes that Copyright Owners argue that benchmarks support the terms and definitions Copyright Owners propose and that their proposed definitions are comparable to terms the Services have agreed to in free market deals. *Id.* Google asserts that these benchmarks and free market deals are the exact documents Google seeks in RFP 3 and are essential for investigating whether Copyright Owners' proposed rates and terms are supported by marketplace evidence. *Id.* at 10-11. Google contends that because Copyright Owners' proposed terms are intended to help counterbalance a supposed royalty rate decline that Copyright Owners trace back to 2009, Google is entitled to examine historical license agreements to assess the prevalence of any allocation provisions in purportedly comparable free market deals. *Id.* at 11. Google asserts that to test Copyright Owners' claims that marketplace licenses support their proposed terms, it is entitled to see "a full complement of relevant license agreements..." Motion at 13.

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<sup>5</sup> Google argues that the compromise Copyright Owners discuss was limited to RFPs propounded by Apple, Amazon, Spotify, and Pandora seeking documents that are not equivalent to those Google seeks in RFP 2. Google Reply at 4. Google also disputes that the information Copyright Owners have provided to date is sufficient, arguing that all documents included in Copyright Owners' direct case were cherry-picked by Copyright Owners, that the client-by-client data produced by the music publishers only reach back to 2017, telling an incomplete story of mechanical income received by Songwriters. *Id.* at 3-4. Google also argues that the summary data Copyright Owners provided are either aggregated or use incomprehensible code names or both and lack any identification of who the top 10% Songwriters are for each year and how much mechanical royalty income they each received. *Id.* at 4.

<sup>6</sup> Google contends that Copyright Owners claim their proposed definitions of "Offering" and "Service Provider Revenue" are based on the treatment of revenues in "sound recording agreements." Motion at 11, n.8. Google asserts that Copyright Owners' attempts to justify their proposed terms based on supposedly similar benchmark agreements underscores Google's entitlement to the discovery Google seeks in RFP 3. *Id.* at 11.

Google dismisses Copyright Owners' assertions that the requested production is unduly burdensome, noting that if Copyright Owners conducted a comprehensive survey of the relevant licenses to conclude that such licenses support the terms they propose, then they should be capable of producing or identifying all license agreements that bear on the veracity of those contentions. *Id.* at 13.<sup>7</sup>

Copyright Owners object on several grounds. First, Copyright Owners claim to have produced some license agreements dating back to 2017, which they claim "is the very information Google professes to be seeking." Opposition at 9. Second, Copyright Owners claim Google is "retrofitting" RFP 3 into an open-ended request for "all licenses 'in which revenues of the licensee are allocated or subject to any form of reduction for purposes of calculating royalty payments.'" *Id.* at 9-10. Copyright Owners contend that RFP 3, as interpreted by Google, is "another" attempt by Google to impose undue burdens on Copyright Owners. *Id.* at 10.<sup>8</sup> Third, Copyright Owners contest Google's claim that the requested documents relate to their WDS. Fourth, they contend the temporal sweep is too broad. *Id.* at 10. Finally, they claim the licenses Google requests are fully available from the record in *Phonorecords III* and are identified in Appendix A to Copyright Owners' Opposition. *Id.* at 11.

In its Reply, Google contends that it has never limited the scope of its request to only the "hand-picked" benchmark agreements upon which Copyright Owners based their Proposed Rates and Terms, nor has it retrofitted its request, as Copyright Owners allege. Reply at 6-7. Google contends that the benchmark agreements Copyright Owners identify in Appendix A to their Opposition, only two of which pre-date 2012, are just a piece of the overall landscape of free market deals that purportedly support Copyright Owners' Proposed Rates and Terms. *Id.* at 7. From Google's perspective, it is entitled to a full production of marketplace licenses for the post-2009 period that Copyright Owners have put in dispute so that Google may examine Copyright Owners' numerous claims that marketplace evidence supports their proposed terms. *Id.*

Google asserts that the current situation is different from the one the Judges addressed in the *Phonorecords III* Order in which they denied discovery relating to the subpart A Settlement. *Id.* at 7-8. Unlike in that instance, Google contends that here Copyright Owners' WDS does rely on free market deals that supposedly contain provisions comparable to those in their Proposed Rates and Terms. *Id.* at 8. Google points out that Copyright Owners do not argue that there would be any actual burden associated with producing all license agreements from 2009 to present, and notes that Copyright Owners themselves have requested Google licensing agreements dating back to 2009. *Id.* at 8-9.

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<sup>7</sup> With respect to the temporal breadth of Google RFP 3, Google states that Copyright Owner witnesses submitted written direct testimony claiming an industry-threatening decline in mechanical royalties since 2009, which, in Google's opinion, precludes Copyright Owners arguing that discovery related to that period is untenable and too wide-sweeping. Motion at 12. Google contends that Copyright Owners have failed to identify any responsive pre-2017 licenses produced in the *Phonorecords III* proceeding. *Id.* at 12-13.

<sup>8</sup> Copyright Owners contend that RFP 3 is pretextual, arguing that after Copyright Owners explained that there is no basis for Google to seek licenses dating back to 2009, Google's rationale for the request pivoted from Copyright Owners' Proposed Rates and Terms to a claim of an industry-threatening decline in mechanical royalties since 2009. Opposition at 10. Copyright Owners contend that such justification is a non-sequitur that has nothing to do with RFP 3 and appears to be a universal fall-back justification for Google. *Id.*

## Analysis

Google's RFP 2 seeks information that, if produced, will likely have little or no probative value. The point at issue in this proceeding is not how many dollars a given songwriter earns, but whether, overall, the royalties the streaming services pay are comparable to royalties that a willing buyer would pay a willing seller. The earnings of publishers and songwriters might inform the Judges regarding the state of a (hand-picked) segment of the market (whether chosen witnesses or "top 10%"). In the end, however, the Judges' decision will rest not on anecdotal evidence standing in isolation, but rather on economic analysis, and certainly not on a particular individual's perspective on the market as it applies to him or her.

What Google seeks are copies of agreements between licensors regarding allocation of royalty income. What is relevant to this proceeding is evidence of licensor revenues and how those revenues stand up to what would be earned in a hypothetical market when negotiated by a willing buyer and willing seller. Secondly, Google's request for specific licensing agreements dating back to 2009 is no overreach.<sup>9</sup> Copyright Owner witnesses have used 2009 as a start date for their income comparisons.

Copyright Owners have seemingly placed at issue the purportedly low level of songwriter income and its decline from and after 2009. Thus, Google's RFP 2 requests are "directly related" to Copyright Owners' WDS. *See* 37 C.F.R. § 351.5(b). Accordingly, RFP 2 seeks discoverable material.

With regard to RFP 3, Google hinges the request on Copyright Owners' references to "benchmarks" and "free market deals" in their discussion of proposed definitional terms for the section 115 license. The "benchmarks" and "deals" the Copyright Owners cite are licensing agreements; that is, what a licensee pays for use of a licensors' copyrighted property. Copyright Owners claim their proposed definitional changes comport with negotiated license agreements. Copyright Owners have opened the door to discovery of license agreements available to Copyright Owners, whether those agreements support the proposed definitional changes or not.

## Ruling

For the foregoing reasons, and based on the entirety of the briefing, the Judges **GRANT CONDITIONALLY** Google's Motion as regards RFP 2. However, in their foregoing analysis, the Judges noted that the issue of songwriter shares of publisher royalty income appears irrelevant to the application of the section 115 standard. Therefore, in the interim between the issuance of this Order and the due date for production in compliance with this order, notwithstanding regulatory provisions to the contrary, the Judges will allow Copyright Owners to file a revised WDS that withdraws any argument, evidence, and testimony regarding the level of songwriter income derived from publisher contracts. If Copyright Owners choose to make such

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<sup>9</sup> Google, in fact, agreed to modify RFP 2 and accept agreements relating to the top 10% of royalty account holders, whether they be songwriters or devisees or assignees of songwriters. Google's offer does not change the Judges' analysis of the underlying issue.

revisions to their WDS, this Conditional Granting of the Motion shall be deemed vacated<sup>10</sup>, and the Motion shall automatically be deemed DENIED AS MOOT with regard to RFP 2.

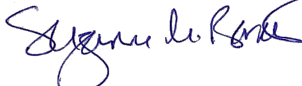
The Judges **GRANT** Google's motion regarding RFP 3.

The Judges **ORDER** that Copyright Owners produce responsive materials no later than ten days from the date of this Order, except to the extent part of the Order may be vacated by action of Copyright Owners, as described above in this section of the Order.

The Judges **FURTHER ORDER** that Copyright Owners provide a statement of search efforts they undertake and, if no responsive documents are found, an affirmative statement that no responsive documents exist.

Within ten days of the date of issuance of this Restricted Order, the affected parties shall file an agreed redacted version for public viewing.

**SO ORDERED.**

 Digitally signed by  
Suzanne Barnett  
Date: 2022.04.28  
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Suzanne M. Barnett  
Chief Copyright Royalty Judge

Dated: April 28, 2022.

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<sup>10</sup> Vacating of this portion of the Order shall be self-executing.